

BEFORE THE
BOARD OF REGISTERED NURSING
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:

DAVID DANIEL DUNCAN

Applicant for Registered Nurse License

Respondent.

Case No. 2012-194

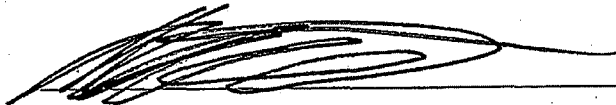
OAH No. 2011100824

DECISION

The attached proposed decision of the Administrative Law Judge is hereby adopted by the Board of Registered Nursing as its Decision in the above-entitled matter.

This Decision shall become effective on July 27, 2012.

IT IS SO ORDERED this 27th day of June, 2012.



President
Board of Registered Nursing
Department of Consumer Affairs
State of California

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Against:

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PROPOSED DECISION

Humberto Flores, Administrative Law Judge with the Office of Administrative Hearings heard this matter on April 10, 2012, in Los Angeles, California.

Deputy Attorney General Linda Sun represented Complainant. David Daniel Duncan (respondent) appeared personally and represented himself.

Evidence was received and the matter was submitted. The Administrative Law Judge finds as follows:

FACTUAL FINDINGS

1. Complainant Louise R. Bailey, M.Ed., R.N., filed the Statement of Issues in her official capacity as Executive Officer of the Board of Registered Nursing (Board), Department of Consumer Affairs.
2. On August 16, 2010, the Board received an application for a Registered Nurse License from respondent. The Board denied that application on December 13, 2010.
3. Respondent has been licensed as a registered nurse in the State of New York since 1991, with no record of discipline.
4. On January 22, 1979, in the Justice Court of Erie County, State of New York, respondent entered a plea of guilty and was convicted of violating New York Penal Law Code, Article 240, section 240.20, subdivision (7), disorderly conduct. Respondent was originally charged with petit larceny for stealing \$1.50 worth of gasoline. Based on the facts and circumstances of the offense, the conviction is substantially related to the duties, functions and qualifications of a registered nurse. The court placed respondent on one-year conditional discharge.

5. On March 24, 1998, in the Justice Court of Erie County, State of New York (Case No. 848780), respondent was convicted after a court trial of violating New York Penal Law Code, Article 130, section 130.55, sexual abuse in the third degree, a misdemeanor that is substantially related to the duties, functions and qualifications of a registered nurse. The court placed respondent on one year conditional discharge under terms and conditions.

6. Respondent admits that he suffered the conviction but denies the charge of sexual abuse. Respondent testified that the underlying facts of the case were that he had a two-month consensual sexual affair with a married co-worker who accused him of the charged offense. Respondent believes that what he did was immoral, but he denied perpetrating any unwanted sexual advances. Respondent testified credibly during the hearing. However, even if respondent's version of the incident is true, the Board may deny his application for licensure based solely on this conviction.

7. Respondent testified that after undergoing a divorce and losing both of his parents, he started to drink alcohol to excess and used drugs (marijuana and cocaine) intermittently. He engaged in self-destructive behavior throughout the decade of the 1990s. In 2001, respondent began the process of rehabilitation. He sought psychiatric counseling and eventually began counseling with Dr. Thomas Small, a psychiatrist who specializes in treating patients with substance abuse problems. In his counseling program, Dr. Small requires his patient to undergo urine toxicology testing. Dr. Small wrote a letter on behalf of respondent attesting that respondent has passed all drug testing and has been free of all illegal drugs since he began counseling. During the past 10 years, respondent was tested for drugs on a monthly basis and has never failed a drug test. He has been free of illegal drugs and alcohol for the past ten years. Since moving to California in 2010, respondent has continued to receive personal counseling with a psychiatrist in Moorpark, California.

8. Respondent has remarried, and he and his wife have a nine-year-old daughter. His wife is a registered nurse who has obtained her California RN license. His wife provides moral support as well as a stable home environment. In addition, respondent has a very close and loving relationship with his daughter. In fact, his daughter testified at the hearing, stating the respondent has been a loving father.

9. Despite his past problems with alcohol and occasional drug use, respondent functioned well at work. He has never been disciplined while a practicing nurse in New York. In fact, respondent has worked as a nurse supervisor for large health care facilities for the past 10 years. The evidence established that he has been an outstanding nurse supervisor who teaches and mentors other nurses.

10. In his application for licensure, respondent did not disclose the conviction set forth in factual findings 4 and 5.

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LEGAL CONCLUSIONS

1. Cause exists to deny the application of respondent for a registered nurse license, under Business and Professions Code sections 480, subdivision (a)(1), 2736, and 2761, subdivisions (a) and (f), for the convictions set forth in findings 4 and 5.
2. Cause exists to deny the application of respondent for a registered nurse license, under Business and Professions Code sections 480, subdivision (c), and 2736, for failing to disclose his convictions in his application for licensure, as set forth in finding 10.
3. Cause exists to deny the application of Respondent for a registered nurse license, under Business and Professions Code sections 480, subdivision (a)(1), 2736, and 2761, subdivisions (a) and (f), for committing acts that are grounds for discipline, as set forth in findings 4 and 5.
4. Respondent established mitigation and rehabilitation as set forth in factual findings 6 through 9. He has a stable family life and a substantial support system consisting of his family and his therapist. He has 10 years of sobriety. From 2002 through 2010, respondent underwent regular testing for illegal drugs and never failed a single test. He has over 20 years experience working as a registered nurse in New York State with no record of discipline. He has 10 years experience working as supervising registered nurse in a large health care facility in New York. The evidence established that respondent is an excellent nurse. Respondent presented substantial evidence of rehabilitation. However, respondent's failure to disclose his convictions dictates that any license issued to respondent should include a period of probation under appropriate conditions. Such a probationary license would adequately protect the public.

ORDER

The application of respondent David Daniel Duncan for a registered nurse license is granted. The registered nurse license issued pursuant to this order shall immediately be revoked, the order of revocation stayed and respondent placed on probation for three years on the following conditions:

SEVERABILITY CLAUSE –

Each condition of probation contained herein is a separate and distinct condition. If any condition of this Order, or any application thereof, is declared unenforceable in whole, in part, or to any extent, the remainder of this Order, and all other applications thereof, shall not be affected. Each condition of this Order shall separately be valid and enforceable to the fullest extent permitted by law.

(1) OBEY ALL LAWS - Respondent shall obey all federal, state and local laws. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board in writing within seventy-two (72) hours of occurrence. To permit monitoring of

compliance with this condition, respondent shall submit completed fingerprint forms and fingerprint fees within 45 days of the effective date of the decision, unless previously submitted as part of the licensure application process.

CRIMINAL COURT ORDERS: If respondent is under criminal court orders, including probation or parole, and the order is violated, this shall be deemed a violation of these probation conditions, and may result in the filing of an accusation and/or petition to revoke probation.

(2) COMPLY WITH THE BOARD'S PROBATION PROGRAM - Respondent shall fully comply with the conditions of the Probation Program established by the Board and cooperate with representatives of the Board in its monitoring and investigation of the respondent's compliance with the Board's Probation Program. Respondent shall inform the Board in writing within no more than 15 days of any address change and shall at all times maintain an active, current license status with the Board, including during any period of suspension.

Upon successful completion of probation, respondent's license shall be fully restored.

(3) REPORT IN PERSON - Respondent, during the period of probation, shall appear in person at interviews/ meetings as directed by the Board or its designated representatives.

(4) RESIDENCY, PRACTICE, OR LICENSURE OUTSIDE OF STATE - Periods of residency or practice as a registered nurse outside of California shall not apply toward a reduction of this probation time period. Respondent's probation is tolled, if and when he resides outside of California. The Respondent must provide written notice to the Board within 15 days of any change of residency or practice outside the state, and within 30 days prior to re-establishing residency or returning to practice in this state.

Respondent shall provide a list of all states and territories where he has ever been licensed as a registered nurse, vocational nurse, or practical nurse. Respondent shall further provide information regarding the status of each license and any changes in such license status during the term of probation. Respondent shall inform the Board if he applies for or obtains a new nursing license during the term of probation.

(5) SUBMIT WRITTEN REPORTS - Respondent, during the period of probation, shall submit or cause to be submitted such written reports/declarations and verification of actions under penalty of perjury, as required by the Board. These reports/declarations shall contain statements relative to respondent's compliance with all the conditions of the Board's Probation Program. Respondent shall immediately execute all release of information forms as may be required by the Board or its representatives.

Respondent shall provide a copy of this decision to the nursing regulatory agency in every state and territory in which he has a registered nurse license.

(6) FUNCTION AS A REGISTERED NURSE - Respondent, during the period of probation, shall engage in the practice of registered nursing in California for a minimum of 24 hours per week for 6 consecutive months or as determined by the Board.

For purposes of compliance with the section, "engage in the practice of registered nursing" may include, when approved by the Board, volunteer work as a registered nurse, or work in any non-direct patient care position that requires licensure as a registered nurse.

The Board may require that advanced practice nurses engage in advanced practice nursing for a minimum of 24 hours per week for 6 consecutive months or as determined by the Board.

If respondent has not complied with this condition during the probationary term, and the respondent has presented sufficient documentation of his good faith efforts to comply with this condition, and if no other conditions have been violated, the Board, in its discretion, may grant an extension of the respondent's probation period up to one year without further hearing in order to comply with this condition. During the one year extension, all original conditions of probation shall apply.

(7) EMPLOYMENT APPROVAL AND REPORTING REQUIREMENTS - Respondent shall obtain prior approval from the Board before commencing or continuing any employment, paid or voluntary, as a registered nurse. Respondent shall cause to be submitted to the Board all performance evaluations and other employment related reports as a registered nurse upon request of the Board.

Respondent shall provide a copy of this decision to his employer and immediate supervisors prior to commencement of any nursing or other health care related employment.

In addition to the above, respondent shall notify the Board in writing within seventy-two (72) hours after he obtains any nursing or other health care related employment. Respondent shall notify the Board in writing within seventy-two (72) hours after he is terminated or separated, regardless of cause, from any nursing, or other health care related employment with a full explanation of the circumstances surrounding the termination or separation.

(8) SUPERVISION - Respondent shall obtain prior approval from the Board regarding respondent's level of supervision and/or collaboration before commencing or continuing any employment as a registered nurse, or education and training that includes patient care.

Respondent shall practice only under the direct supervision of a registered nurse in good standing (no current discipline) with the Board of Registered Nursing, unless alternative methods of supervision and/or collaboration (e.g., with an advanced practice nurse or physician) are approved.

Respondent's level of supervision and/or collaboration may include, but is not limited to the following:

(a) Maximum - The individual providing supervision and/or collaboration is present in the patient care area or in any other work setting at all times.

(b) Moderate - The individual providing supervision and/or collaboration is in the patient care unit or in any other work setting at least half the hours Respondent works.

(c) Minimum - The individual providing supervision and/or collaboration has person-to-person communication with Respondent at least twice during each shift worked.

(d) Home Health Care - If respondent is approved to work in the home health care setting, the individual providing supervision and/or collaboration shall have person-to-person communication with respondent as required by the Board each work day. Respondent shall maintain telephone or other telecommunication contact with the individual providing supervision and/or collaboration as required by the Board during each work day. The individual providing supervision and/or collaboration shall conduct, as required by the Board, periodic, on-site visits to patients' homes visited by respondent with or without respondent present.

(9) EMPLOYMENT LIMITATIONS - Respondent shall not work for a nurse's registry, in any private duty position as a registered nurse, a temporary nurse placement agency, a traveling nurse, or for an in-house nursing pool.

Respondent shall not work for a licensed home health agency as a visiting nurse unless the registered nursing supervision and other protections for home visits have been approved by the Board. Respondent shall not work in any other registered nursing occupation where home visits are required.

Respondent shall not work in any health care setting as a supervisor of registered nurses. The Board may additionally restrict respondent from supervising licensed vocational nurses and/or unlicensed assistive personnel on a case-by-case basis.

Respondent shall not work as a faculty member in an approved school of nursing or as an instructor in a Board approved continuing education program.

Respondent shall work only on a regularly assigned, identified and predetermined worksite(s) and shall not work in a float capacity.

If respondent is working or intends to work in excess of 40 hours per week, the Board may request documentation to determine whether there should be restrictions on the hours of work.

(10) COMPLETE A NURSING COURSE(S) - Respondent, at his own expense, shall enroll and successfully complete a course(s) relevant to the practice of registered nursing no later than six months prior to the end of his probationary term.

Respondent shall obtain prior approval from the Board before enrolling in the course(s). Respondent shall submit to the Board the original transcripts or certificates of completion for the above required course(s). The Board shall return the original documents to respondent after photocopying them for its records.

(11) **COST RECOVERY** – This provision is not applicable in this case.

(12) **VIOLATION OF PROBATION** - If respondent violates the conditions of his probation, the Board after giving the respondent notice and an opportunity to be heard, may set aside the stay order and impose the stayed discipline (revocation/suspension) of respondent's license.

If during the period of probation, an accusation or petition to revoke probation has been filed against respondent's license or the Attorney General's Office has been requested to prepare an accusation or petition to revoke probation against respondent's license, the probationary period shall automatically be extended and shall not expire until the accusation or petition has been acted upon by the Board.

(13) **LICENSE SURRENDER** - During respondent's term of probation, if he ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the conditions of probation, respondent may surrender his license to the Board. The Board reserves the right to evaluate respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances, without further hearing. Upon formal acceptance of the tendered license and wall certificate, respondent will no longer be subject to the conditions of probation.

Surrender of respondent's license shall be considered a disciplinary action and shall become a part of respondent's license history with the Board. A registered nurse whose license has been surrendered may petition the Board for reinstatement no sooner than the following minimum periods from the effective date of the disciplinary decision:

- (1) Two years for reinstatement of a license that was surrendered for any reason other than a mental or physical illness; or
- (2) One year for a license surrendered for a mental or physical illness.

DATED: April 24, 2012


HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings

Exhibit A

Statement of Issues Case No. 2012-194

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7 *Attorneys for Complainant*

8 **BEFORE THE**
9 **BOARD OF REGISTERED NURSING**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Statement of Issues
13 Against:

14 **DAVID DANIEL DUNCAN**
20528 Ventura Blvd, Apt. 409
Woodland Hills, CA 91364

Respondent.

Case No.

2012-194

STATEMENT OF ISSUES

15 Complainant alleges:

16 **PARTIES**

17 1. Louise R. Bailey, M.Ed., RN (Complainant) brings this Statement of Issues solely in
18 her official capacity as the Executive Officer of the Board of Registered Nursing (Board),
19 Department of Consumer Affairs.

20 2. On or about August 16, 2010, the Board received an application for a Registered
21 Nurse License by Endorsement from David Daniel Duncan (Respondent). On or about August 8,
22 2010, Respondent certified under penalty of perjury to the truthfulness of all statements, answers,
23 and representations in the application. The Board denied the application on December 13, 2010.

24 **JURISDICTION**

25 3. This Statement of Issues is brought before the Board under the authority of the
26 following laws. All section references are to the Business and Professions Code unless otherwise
27 indicated.
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1 "(f) Conviction of a felony or of any offense substantially related to the qualifications,
2 functions, and duties of a registered nurse, in which event the record of the conviction shall be
3 conclusive evidence thereof."

4 **REGULATORY PROVISIONS**

5 7. California Code of Regulations, title 16, section 1444 states, in pertinent part:

6 "A conviction or act shall be considered to be substantially related to the qualifications,
7 functions or duties of a registered nurse if to a substantial degree it evidences the present or
8 potential unfitness of a registered nurse to practice in a manner consistent with the public health,
9 safety, or welfare."

10 **FIRST CAUSE FOR DENIAL OF APPLICATION**

11 **(Convictions of Crimes)**

12 8. Respondent's application is subject to denial under Code sections 2736, 2761,
13 subdivision (f) and 480, subdivision (a)(1), in that Respondent was convicted of crimes, as
14 follows:

15 a. On or about March 24, 1998, pursuant to his guilty plea, Respondent was convicted
16 of one class B misdemeanor count of violating New York Penal Law-Article 130, section 130.55
17 [sexual abuse in the third degree] in the criminal proceeding entitled *The People of the State of*
18 *New York v. David D. Duncan* (Jus. Ct. Erie County, 1998, No. 848780). The Court placed
19 Respondent on one year conditional discharge, with terms and conditions. The circumstances
20 surrounding the conviction are that on or about August 5, 1997, Respondent subjected another
21 person to sexual contact without consent.

22 b. On or about January 22, 1979, pursuant to his guilty plea, Respondent was convicted
23 of one misdemeanor count of violating New York Penal Law-Article 240, section 240.20,
24 subdivision (7) [disorderly conduct] in the criminal proceeding entitled *The People of the State of*
25 *New York v. David D. Duncan* (Jus. Ct. Erie County, 1979.) The Court ordered Respondent to
26 pay fines and restitution. The circumstances are that on or about September 28, 1978,
27 Respondent caused a public inconvenience, annoyance, or alarm, or recklessly created a risk
28 thereof.

1 **SECOND CAUSE FOR DENIAL OF APPLICATION**

2 **(Knowingly Made a False Statement of Fact)**

3 9. Respondent's application is subject to denial under Code sections 2736 and 480,
4 subdivision (c), in that Respondent knowingly made a false statement of fact, by failing to
5 disclose two conviction cases against him on his application for licensure. Complainant refers to,
6 and by this reference incorporates, the allegations set forth above in paragraph 8, as though set
7 forth fully.

8 **THIRD CAUSE FOR DENIAL OF APPLICATION**

9 **(Acts Warranting Denial of Licensure)**

10 10. Respondent's application is subject to denial under Code sections 480, subdivision
11 (a)(3)(A) and (a)(3)(B), in that Respondent committed acts which if done by a licentiate of the
12 business and profession in question, would be grounds for suspension or revocation of his license.
13 Respondent was convicted of a crime substantially related to the qualifications, functions, or
14 duties of a registered nurse which to a substantial degree evidence his present or potential
15 unfitness to perform the functions authorized by his license in a manner consistent with the public
16 health, safety, or welfare, in violation of Code sections 2761, subdivision (f) and 490, in
17 conjunction with California Code of Regulations, title 16, section 1444. Complainant refers to,
18 and by this reference incorporates, the allegations set forth above in paragraph 8, as though set
19 forth fully.

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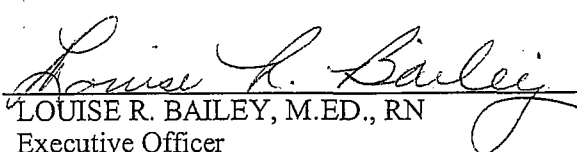
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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board issue a decision:

1. Denying the application of David Daniel Duncan for Registered Nurse License by Endorsement; and
2. Taking such other and further action as deemed necessary and proper.

DATED: September 29, 2011


LOUISE R. BAILEY, M.ED., RN
Executive Officer
Board of Registered Nursing
Department of Consumer Affairs
State of California
Complainant

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